

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

PACIFIC SOUND RESOURCES, a  
Washington non-profit corporation; and THE  
PORT OF SEATTLE, a Washington municipal  
corporation,

Plaintiffs,

v.

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY, a  
Delaware corporation; J.H. BAXTER & CO., a  
California limited partnership; J.H. BAXTER &  
CO., a California corporation; and J.H.  
BAXTER & CO., INC., a California  
corporation,

Defendants.

No. C04-1654L

PLAINTIFFS' RESPONSE TO BNSF'S  
MOTION FOR SUMMARY JUDGMENT  
REGARDING REMEDIAL ACTION  
COSTS UNDER MTCA, STANDING,  
AND COMMON LAW CLAIMS

**NOTED ON MOTION CALENDAR:  
October 21, 2005**

**ORAL ARGUMENT REQUESTED**

**I. INTRODUCTION**

BNSF's motion for summary judgment should be denied as a matter of law because plaintiff Pacific Sound Resources (PSR) has a viable claim for contribution under the Model Toxics Control Act (MTCA), RCW 70.105D.080 based on its payments to the U.S. Environmental Protection Agency (EPA) for remedial action implemented by EPA.

BNSF's argument is premised on the theory that MTCA limits contribution claims to those costs "actually incurred by a party." The statute contains no such requirement, however, and instead creates a right to contribution "for the recovery of remedial action costs" paid by a

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1 party regardless of who actually “performed” the work. BNSF’s position would subvert  
 2 MTCA’s policy of encouraging settlements and cooperation between private parties and the  
 3 Washington Department of Ecology (Ecology). Denying contribution rights to individual parties  
 4 who are asked to reimburse Ecology for its cleanup costs would make those parties unwilling to  
 5 settle unless litigation were brought against all responsible parties.

6 BNSF’s standing arguments are incorrect as a matter of law since PSR has a real injury  
 7 and the relief sought in this case will address that injury. Although PSR was only one of several  
 8 operators of the site, and one of even many more potentially responsible parties, it agreed to  
 9 liquidate all of its assets and provide the proceeds to EPA to cleanup the environment. PSR’s  
 10 injury, therefore, is based on the fact that it has paid more than its fair share of the liability at the  
 11 site. It is entitled to a judgment awarding it contribution from other responsible parties, which  
 12 will redress the injury. It is irrelevant whether PSR ultimately gets to keep the money or whether  
 13 it pays the money to EPA in satisfaction of an earlier obligation. Moreover, BNSF’s position on  
 14 standing would frustrate the intent of this Court. Judge Rothstein approved the 1994 Consent  
 15 Decree, which specifically authorized PSR to pursue claims against other responsible parties  
 16 even though the recoveries would ultimately pass to EPA.

17 BNSF’s arguments regarding PSR’s common law claims also fail as a matter of law.  
 18 Under Washington law, nuisance is a statutory claim, and the types of claims allowed under the  
 19 statute do not require interference with a possessory interest. PSR’s nuisance claims are not  
 20 barred by the statute of limitations since they constitute continuing torts. The statute of  
 21 limitations in Washington does not bar claims for continuing torts as long as the contamination is  
 22 still present, which is undisputed in this case.

## 23 **II. STATEMENT OF UNDISPUTED FACTS**

24 BNSF’s statement of facts is largely accurate as far as it goes. As BNSF acknowledges,  
 25 PSR (formerly known as the Wyckoff Company) solely owned and operated the West Seattle  
 26 plant from 1965 until 1994, a period of 29 years. *See* BNSF Motion for Summary Judgment that

1 Plaintiff Pacific Sound Resources Has Incurred No Remedial Action Costs Under MTCA and  
 2 Lacks Standing to Seek Contribution or Damages, and that PSR's Common Law Claims are  
 3 Time Barred (BNSF Motion) at 4. The plant operated from approximately 1912 until 1994, a  
 4 period of 82 years. *Id.* Therefore, PSR was the sole owner and operator of the Site for 35% of  
 5 the years during which the plant operated.

6 BNSF and its predecessors, the Northern Pacific Railway Co. and the Great Northern  
 7 Railway,<sup>1</sup> had a much lengthier period of connection to the wood treating operations. The first  
 8 documented agreement between BNSF and its predecessors was signed in 1926. Declaration of  
 9 Gillis E. Reavis in Support of Response to BNSF's Motion for Summary Judgment Regarding  
 10 MTCA Remedial Action Costs (Reavis Dec.) at 12 (1926 Treating contract). BNSF operations  
 11 continued through at least 1984. Reavis Dec. at 33 (Burlington Northern correspondence).

12 The 1926 agreement was between the Northern Pacific Railway Co. and the The J.M.  
 13 Colman Co., which was then the operator of the treating plant. Reavis Dec. at 12. It stated that  
 14 The J.M. Colman Co. "will at its own cost and expense erect and equip a plant and storage yard  
 15 for seasoning, boring, adzing, incising and treating cross ties and treating other material with  
 16 creosote or a mixture of petroleum and creosote in accordance with specifications in Exhibit 'A'  
 17 attached and made part of this contract." *Id.* Under the contract, Northern Pacific furnished the  
 18 ties, timber and other lumber to be treated. *Id.* at 13. It furnished rail cars for transporting raw  
 19 materials to the site and treated materials from the site. *Id.* at 14. It furnished all of the creosote  
 20 and petroleum required to treat its lumber in rail cars or by vessel. *Id.* at 16. Northern Pacific

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21  
 22 <sup>1</sup> The company now known as The Burlington Northern and Santa Fe Railway Company was originally incorporated  
 23 in 1961 under the name of Great Northern Pacific and Burlington Lines, Inc. On March 20, 1970, Great Northern  
 24 Railway Company and Northern Pacific Railway Company were merged into Great Northern Pacific and Burlington  
 25 Lines, Inc. On the same day, the name was changed to Burlington Northern Inc., then later to Burlington Northern  
 26 Railroad Company, which became a wholly-owned subsidiary of Burlington Northern Inc. On December 31, 1996,  
 The Atchison, Topeka and Santa Fe Railway Company was merged into and with Burlington Northern Railroad  
 Company under the name of The Burlington Northern and Santa Fe Railway Company, which is a defendant in this  
 case. Reavis Dec. at 4 (BNSF answers to interrogatories in *Pacific Sound Resources and the Port of Seattle v. The  
 Burlington Northern and Santa Fe Railway Company, et al.*, No. 02-2-27778-1SEA in the King County Superior  
 Court).

1 agreed to “carry the insurance and pay the taxes on creosote and oil stored for it by the  
 2 Creosoting Company [J.M. Colman].” *Id.* The 1926 contract attached detailed specifications for  
 3 its products, which controlled not only the finished product but the method by which the treating  
 4 process was conducted and the details of that process. *Id.* at 12.

5 Similar contracts were signed in 1937, 1944 and 1946. *Id.* at 37, 47 and 55. They  
 6 established the relationship between BNSF and the various treating companies over the years  
 7 until Burlington Northern ceased doing business with the Wyckoff Company. PSR contends that  
 8 these facts establish BNSF’s liability under MTCA, RCW 70.105D.040. BNSF and its  
 9 predecessors had a close working relationship with the treating companies for at least 58 years,  
 10 or 71% of the time that the plant was operating, so at trial the Court will be asked to determine  
 11 what equitable share of liability should be attributed to BNSF. RCW 70.105D.080. PSR’s claim  
 12 in this case seeks contribution in the amount of BNSF’s equitable share.

### 13 **III. ARGUMENT AND AUTHORITIES**

#### 14 **A. Summary Judgment Standard**

15 As the moving party, BNSF bears a heavy summary judgment burden. It must negate, as  
 16 a matter of law, the existence of genuine issues of material fact. *Celotex Corp. v. Catrett*, 477  
 17 U.S. 317, 323 (1986). In considering the evidence to decide whether material issues of fact exist,  
 18 the court must “draw all inferences in the non-movant’s favor.” *Clicks Billiards, Inc. v.*  
 19 *Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9<sup>th</sup> Cir. 2001). BNSF has failed to meet this burden.

#### 20 **B. PSR’s Contribution Claim Is For Remedial Action Costs Under MTCA**

21 BNSF’S entire argument rests on a false premise, that “remedial action costs” are only  
 22 those expenditures made directly to a remedial action contractor. This is not the law. Under  
 23 MTCA, remedial action occurs when expenditures are made to address threats posed by  
 24 hazardous substances. It makes no difference whether the expenditures are made to purchase  
 25 cleanup-related goods and services directly, or whether they are made to another entity who then  
 26

1 purchases goods and services. Either way, the expenditures are remedial actions that may be  
2 recovered in a contribution action under RCW 70.105D.080.

3 Like most potentially liable persons, PSR has not personally collected samples or  
4 installed containment systems to address threats posed by hazardous substances at the Site.  
5 However, it has made expenditures totaling \$11,551,460.64 to address these threats. Declaration  
6 of Diana Norton at ¶ 4; Declaration of Anthony Burgess. PSR paid this money to the PSR Trust,  
7 which transmitted the money to EPA pursuant to the 1994 Consent Decree. In turn, EPA hired  
8 contractors to take actions to minimize the threat from hazardous substances at the PSR Site. *Id.*  
9 That PSR's money passed through the hands of the Trust and EPA before it reached the  
10 contractors is irrelevant for purposes of this lawsuit.

11 According to BNSF, because PSR "has not performed any work itself," it "has not  
12 incurred any remedial action costs within the meaning of RCW 70.105D.020(21) and  
13 70.105D.080 for which it is entitled to contribution." BNSF Motion at 13-14. BNSF does not  
14 cite any authority for this assertion, nor could it. As explained below, BNSF's argument is  
15 contrary to the plain language of MTCA, the regulations that implement the statute, and the  
16 policy that underlies it.

17 **1. MTCA Allows Recovery of All Expenditures Made for Remedial Action,**  
18 **Regardless of Who Performs the Work.**

19 The limitation that BNSF argues for – that only the costs of work performed personally  
20 by the plaintiff are recoverable in a MTCA contribution action – simply does not exist in MTCA.  
21 The statute authorizing a "private right of action" provides, in its entirety, as follows:

22 Except as provided in RCW 70.105D.040(4) (d) and (f), a person may bring a  
23 private right of action, including a claim for contribution or for declaratory relief,  
24 against any other person liable under RCW 70.105D.040 for the recovery of  
25 remedial action costs. In the action, natural resource damages paid to the state  
26 under this chapter may also be recovered. Recovery shall be based on such  
equitable factors as the court determines are appropriate. Remedial action costs  
shall include reasonable attorneys' fees and expenses. Recovery of remedial action  
costs shall be limited to those remedial actions that, when evaluated as a whole,  
are the substantial equivalent of a department-conducted or department-  
supervised remedial action. Substantial equivalence shall be determined by the

1 court with reference to the rules adopted by the department under this chapter. An  
 2 action under this section may be brought after remedial action costs are incurred  
 3 but must be brought within three years from the date remedial action confirms  
 4 cleanup standards are met or within one year of May 12, 1993, whichever is later.  
 5 The prevailing party in such an action shall recover its reasonable attorneys' fees  
 6 and costs. This section applies to all causes of action regardless of when the cause  
 7 of action may have arisen. To the extent a cause of action has arisen prior to May  
 8 12, 1993, this section applies retroactively, but in all other respects it applies  
 9 prospectively.

10 RCW 70.105D.080. Nothing in this section specifies *who* must conduct the cleanup for the costs  
 11 to be recoverable. In fact, the statute appears to have been carefully drafted to avoid identifying  
 12 an actor. A private right of action is “for the recovery of remedial action costs,” without regard  
 13 to whether the party performing the work was the liable person, a government agency, or a  
 14 contractor hired by either of them.

15 Several provisions of RCW 70.105D.080 reinforce this reading. First, the legislature’s  
 16 use of the phrase “a claim for contribution” in RCW 70.105D.080 makes clear that parties who  
 17 have not themselves performed work may bring contribution actions. The legislature is  
 18 presumed to know the legal definition of terms such as “contribution.” *Rasor v. Retail Credit*  
 19 *Co.*, 87 Wn.2d 516, 530, 554 P.2d 1041 (1976) (familiar legal term used in a statute is given its  
 20 familiar legal meaning). Washington courts have defined contribution as “the right of one who  
 21 has paid a common liability to recover a portion of the payment from another tortfeasor who  
 22 shares in that common liability.” *Kottler v. State*, 136 Wn.2d 437, 963 P.2d 834 (1998), *citing*  
 23 *Black's Law Dictionary* 328 (6th ed.1990).

24 When it created the right of contribution in MTCA, the legislature understood that one of  
 25 many liable parties could end up paying for an entire cleanup himself. This is clear from the  
 26 legislature’s reference in RCW 70.105D.080 to allocating remedial action costs based on  
 “equitable factors,” since it is only where multiple parties are liable that equitable allocation of  
 liability would be necessary. By authorizing claims for “contribution” in this section, the  
 legislature intended to allow a party who did not perform cleanup, but who paid more than its  
 fair share of “a common liability,” to pursue others who had not yet paid.

1 PSR's claim is based on the same well-known common law principle that was adopted in  
 2 MTCA. PSR has paid more than its fair share and now brings a claim for contribution against  
 3 BNSF. Absent explicit statutory language rejecting the normal definition of contribution – and  
 4 there is none – MTCA authorizes claims by persons who paid remedial action costs to another  
 5 but did not themselves “perform” the work.

6 Second, MTCA's definition of “remedial action” demonstrates that the legislature did not  
 7 intend to limit contribution claims as BNSF contends. The three-word phrase “remedial action  
 8 costs” is not defined, either in the statute or in Ecology's regulations. However, MTCA defines  
 9 “remedial action” as:

10 any action *or expenditure* consistent with the purposes of this chapter to identify,  
 11 eliminate, or minimize any threat posed by hazardous substances to human health  
 12 or the environment including any investigative and monitoring activities with  
 13 respect to any release or threatened release of a hazardous substance and any  
 14 health assessments or health effects studies conducted in order to determine the  
 15 risk or potential risk to human health.

16 RCW 70.105D.020(21) (emphasis added). Like the statutory provision defining the private right  
 17 action itself, the definition of “remedial action” is silent with respect to *who* must perform the  
 18 work. The focus is on the action, not the actor.

19 Under this definition, an expenditure that is consistent with the purposes of MTCA is  
 20 itself a “remedial action.” A person takes remedial action under MTCA either by acting to  
 21 identify, eliminate, or minimize any threat posed by hazardous substances, *or* by making  
 22 expenditures for these purposes. In other words, it is not necessary that a plaintiff in a MTCA  
 23 contribution action personally act to address hazardous substance threats by collecting data,  
 24 writing reports, or removing contaminants. Instead, he can disburse money to others to pay for  
 25 these goods and services. Under RCW 70.105D.080, the plaintiff has a private right of action for  
 26 any expenditures made to address such threats.

This includes expenditures to government agencies, such as Ecology and EPA. MTCA  
 authorizes Ecology to clean up contaminated sites on its own. RCW 70.105D.030(1)(b)



(Ecology may “[c]onduct, provide for conducting, or require potentially liable persons to conduct remedial actions”). If Ecology conducts a cleanup, it may direct the Attorney General to “recover all costs and damages from persons liable therefore.” RCW 70.105D.040(2). Furthermore, because liability under MTCA is joint and several, Ecology may recover its remedial action costs from one of many liable persons. RCW 70.105D.040(2).

Finally, the legislature obviously contemplated that persons who had reimbursed Ecology’s remedial action costs would, in turn, seek to recover their expenditures from other liable persons using MTCA’s private right of action. When it drafted RCW 70.105D.080, the legislature limited the remedial action costs recoverable to “those remedial actions that, when evaluated as a whole, are the substantial equivalent of a *department-conducted* or department-supervised remedial action.” (Emphasis added). Thus, cleanups performed by Ecology are the benchmark against which all other cleanups are judged in a private right of action. Costs of remedial action that Ecology carries out are therefore among the remedial action costs that may be recovered in a private right of action under RCW 70.105D.080.

Ecology shares this interpretation of the statute. At the legislature’s direction, Ecology drafted rules to implement the requirement of RCW 70.105D.080 that cleanups for which contribution is sought must be the “substantial equivalent” of an Ecology-conducted or Ecology-supervised cleanup. Its rule states in part that:

[T]he department considers the following remedial actions to be the substantial equivalent of a department-conducted or department-supervised remedial action.

(a) A remedial action conducted by the department.

WAC 173-340-545(2)(a). As this provision demonstrates, Ecology interprets RCW 70.105D.080 to allow private parties to pursue contribution claims based on remedial actions conducted by Ecology. This interpretation, made by the agency responsible for implementing MTCA, is entitled to “great weight.” *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 594, 90 P.3d 659 (2004).



**2. BNSF's Argument Would Frustrate the Policies Behind MTCA.**

BNSF's argument disallowing contribution claims for money paid to government agencies (or other private parties) for cleanup would frustrate the basic policies behind MTCA. Some of those policies are described in RCW 70.105D.010:

(2) The main purpose of chapter 2, Laws of 1989 [MTCA] is to raise sufficient funds to clean up all hazardous waste sites and to prevent the creation of future hazards due to improper disposal of toxic wastes into the state's land and waters.

....

(5) Because it is often difficult or impossible to allocate responsibility among persons liable for hazardous waste sites and because it is essential that sites be cleaned up well and expeditiously, each responsible person should be liable jointly and severally.

MTCA recognizes that allocating responsibility among liable parties can be time-consuming and costly. The state's voters, who approved MTCA as an initiative, emphasized that cleanups should not be delayed. For that reason, the voters made liability under MTCA joint and several. In addition, Ecology was given broad enforcement powers, including the power to issue administrative orders. Anyone who fails to comply "without sufficient cause" is subject to treble damages and civil penalties up to \$25,000 per day. RCW 70.105D.050(1). Because liability is joint and several, these measures can be levied against one of many parties, leaving it up to that party to bring claims against the others.

BNSF's argument would place liable parties in an untenable position. If they settle with Ecology and pay for the cleanup Ecology has conducted (or will conduct), they would, under BNSF's construction of the statute, be precluded from recovering from other parties the equitable shares attributable to those parties. If they do not settle, they are subject to treble damages and penalties. One likely consequence is that liable parties will not settle, but will force Ecology to file a lawsuit against all liable parties, thereby frustrating MTCA's "essential" goal that sites be cleaned up "expeditiously."

1 In short, MTCA is based on two complementary principles: joint and several liability,  
 2 coupled with a private right to contribution. Given the goals of MTCA, it would be irrational to  
 3 draft a statute that allows contribution claims only when the liable parties write the checks to  
 4 cleanup contractors, not when Ecology writes the checks and the liable party pays Ecology back.  
 5 This Court has a duty to give a rational, sensible construction to statutes. *Scannell v. City of*  
 6 *Seattle*, 29 Wn. App. 175, 627 P.2d 1000 (1981). Interpreting MTCA in the manner requested  
 7 by BNSF would not be rational or sensible.

### 8 **3. BNSF Offers No Valid Support for its Interpretation of RCW 70.105D.080.**

9 BNSF's argument relies on a strained reading of *Bird-Johnson Corp. v. Dana Corp.*, 119  
 10 Wn.2d 423, 833 P.2d 375 (1992). That case required the Washington Supreme Court to decide  
 11 whether MTCA authorized contribution actions.<sup>2</sup> The Court compared MTCA, which at that  
 12 time had no express right of contribution, with CERCLA, which did include an express right. It  
 13 concluded that MTCA's drafters had deliberately omitted contribution rights.

14 *Bird-Johnson* does not stand for the proposition that every difference between the texts of  
 15 MTCA and CERCLA must be read as a rejection of CERCLA's approach. In fact, the  
 16 Washington Court of Appeals recently cautioned against construing MTCA in this way. *See*  
 17 *Modern Sewer Corp. v. Nelson Distributing, Inc.*, 125 Wn. App. 564, 109 P.3d 11 (2005).  
 18 There, the parties disagreed about the meaning of "disposal," as that term is used in MTCA. No  
 19 definition appears in MTCA, but one is given in CERCLA. Defendant Nelson Distributing  
 20 argued that this difference "g[ave] rise to the inference that [the CERCLA definition was]  
 21 intentionally rejected," citing *Bird-Johnson*.

22 The Court agreed that the difference between the two statutes created an inference – but  
 23 only that MTCA's drafters "did not intend to incorporate the CERCLA/SARA definition" of  
 24 disposal. To infer more than this was unwarranted:

25  
 26 <sup>2</sup> After the Court's decision in *Bird-Johnson*, the legislature amended MTCA to add RCW 70.105D.080, the private right of action at issue in this motion.

1 MTCA's lack of definition for the word "disposal" may be the result of a view  
 2 that the ordinary definition was adequate--that the word needed no special  
 3 definition as a term of art for purposes of the act. Nelson Distributing overstates  
 4 when it argues that the failure of MTCA to define "disposal" as it was defined in  
 5 CERCLA requires us to conclude that the drafters of MTCA intended to reject  
 completely CERCLA's definition of the term "disposal." MTCA did not  
 expressly reject every portion of CERCLA's definition. *Bird-Johnson* does not  
 require us to adopt an ordinary meaning of the word "disposal" that necessarily  
 excludes all of the elements of the CERCLA definition.

6 125 Wn. App. at 570. Similarly, it would be wrong to conclude that remedial action costs paid to  
 7 EPA cannot be recovered under MTCA simply because MTCA's contribution provision is  
 8 written differently than CERCLA's contribution provision. As explained above, any  
 9 expenditures made to address threats posed by hazardous substances are "remedial action" costs.  
 10 Given the broad definition of "remedial action," there was no need for the legislature to specify  
 11 that remedial action costs paid to the government could be recovered in a MTCA contribution  
 12 claim.

13 BNSF also cites the United States Supreme Court's decision in *Cooper Industries, Inc. v.*  
 14 *Aviall Services, Inc.*, 543 U.S. 157, 125 S. Ct. 577 (2004). There, the Court construed a  
 15 provision of CERCLA with no analog in MTCA. To the extent *Aviall* has any relevance here, it  
 16 undermines BNSF's argument. In *Aviall*, the Court ruled that a contribution action under  
 17 CERCLA could not proceed unless the government had first sued the plaintiff, since CERCLA  
 18 authorizes contribution actions only "during or following any civil action" by the government.  
 19 In other words, the Court found that the plain language of the statute meant just what it said.  
 20 Here, it is BNSF that ignores the plain language of the statute, and asks the Court to read into  
 21 MTCA a limitation that the drafters chose not to include.

### 22 **C. PSR Has Standing to Pursue its Claims**

23 BNSF argues that PSR lacks standing under Article III of the Constitution. It cites *Lujan*  
 24 *v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992), for the standing test. According  
 25 to BNSF, PSR's claims (a) fail to demonstrate an "injury in fact" and (b) cannot be redressed by  
 26 a favorable decision in this case. BNSF Motion at 18.

1 BNSF's "injury in fact" argument, however, concerns only statutory construction, not  
 2 constitutional standing - that is, whether PSR's injury is cognizable under the particular statute  
 3 being invoked, MTCA. As discussed above, since MTCA allows private parties to recover  
 4 remedial action costs, BNSF's statutory argument fails. Having paid EPA for those remedial  
 5 action costs, PSR has sustained an injury in fact under Constitutional principles.

6 BNSF's contentions on the redressability argument miss the point, since the injury to  
 7 PSR is that it has paid more than its fair share of the cleanup costs at the PSR Marine Sediments  
 8 Unit, and an order from this Court requiring BNSF to pay its share would redress that injury.  
 9 The Court should therefore reject BNSF's arguments and hold that PSR has standing to bring  
 10 this claim.

11 **1. PSR Has Suffered an "Injury in Fact."**

12 Although BNSF characterizes its "injury in fact" claim as constitutional, its argument  
 13 implicates questions of statutory construction only, and not the Constitution. BNSF argues that  
 14 PSR has not suffered an injury, and therefore cannot invoke the jurisdiction of this Court,  
 15 because it has not incurred "costs for which it might be entitled to contribution under MTCA."  
 16 BNSF Motion at 18. The terms of MTCA, however, do not define an injury in fact under  
 17 Constitutional principles. Under the Constitution, PSR must only allege that it has suffered  
 18 "some direct injury," not a particular type of harm covered under a particular statute. *City of Los*  
 19 *Angeles v. Lyons*, 461 U.S. 95, 101 (1983).

20 As discussed above, BNSF is wrong that PSR has not incurred remedial action costs in  
 21 this case. Cases decided under CERCLA, which was the model for MTCA, hold that while it is  
 22 necessary that a party "incur costs," it is not necessary for a private party actually to have *paid*  
 23 those costs as long as it has *incurred liability* for the costs. *See Trimble v. Asarco, Inc.*, 232 F.3d  
 24 946, 958 (8<sup>th</sup> Cir. 2000), *overruled on other grounds, Exxon Mobil Corp. v. Allapattah Service,*  
 25 *Inc.*, \_\_\_ U.S. \_\_\_, 125 S.Ct. 2611 (2005). Here, PSR not only incurred liability for the costs when  
 26 it entered into the 1994 Consent Decree, it has actually paid millions of dollars of those costs.

1 The dollars that PSR provided to EPA for cleanup of the site constitute MTCA remedial action  
2 costs.

3 They also constitute an injury in fact to PSR in the amount of at least \$11,551,460.64.  
4 PSR's injury is based on the expenditure of a large sum of money, in addition to having paid  
5 more than its fair share of cleanup costs. For standing purposes, PSR has alleged an injury in  
6 fact. *See Karras v. Teledyne Industries, Inc.*, 191 F. Supp. 1162, 1173 (trusts established to pay  
7 cleanup costs and pursue claims on behalf of responsible parties had Constitutional standing  
8 because they paid money to cleanup contractors and to the government).

## 9 **2. PSR's Injury is Redressable by This Court.**

10 Similarly, PSR's injury will be redressed by an order from this Court awarding it  
11 monetary damages in the amount of BNSF's equitable share and a declaratory judgment that  
12 BNSF is liable for future costs. The Court's judgment will directly redress the harm and does  
13 not run afoul of Constitutional standing principles.

14 It is a prerequisite of justiciability that the relief requested will redress the claimed injury.  
15 *Gonzalez v. Gorsuch*, 688 F.2d 1263, 1267 (9<sup>th</sup> Cir. 1982). For instance, injuries are not  
16 redressable when broad relief is requested in the hope that some benefit will trickle down to the  
17 plaintiffs. *See, e.g., Allen v. Wright*, 468 U.S. 737 (1984) (relief requested would not redress  
18 injury because it was merely speculative that a change in IRS policy would lead to more  
19 integrated schools); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976)  
20 (relief requested would not redress injury because it was merely speculative that the plaintiffs  
21 would be provided health care if the IRS changed its Revenue Ruling); and *Linda R.S. v. Richard*  
22 *D.*, 410 U.S. 614 (1973) (relief requested would not redress injury because it was merely  
23 speculative that a threat of prosecution would cause a child's father to pay child support).

24 Similarly, an injury may not be redressable when the court cannot formulate any  
25 meaningful decree. *Gorsuch*, 688 F.2d at 1267, citing *Greater Tampa Chamber of Commerce v.*  
26 *Goldschmidt*, 627 F.2d 258, 263-64 (D.C. Cir. 1980) (invalidation of international executive

1 agreement will not redress injury because act of foreign sovereign necessary for relief); *Boating*  
 2 *Indus. Ass'ns v. Marshall*, 601 F.2d 1376 (9th Cir. 1979) (rescission of administrative  
 3 interpretive notice would not redress injury because no guarantee existed that rescission would  
 4 later bind court). Finally, an injury may not be redressable when the requested relief would  
 5 actually worsen the plaintiff's position. *Gorsuch*, 688 F.2d at 1267, *citing NAACP, Boston*  
 6 *Chapter v. Harris*, 607 F.2d 514, 520 (1st Cir. 1979) (challenge to block grant recipient's  
 7 eligibility, if successful, would mean that grant program's purposes would never be implemented  
 8 in plaintiff's city).

9 Contrary to BNSF's assertion, this case is completely unlike any of the Constitutional  
 10 standing cases, where a court lacks power to render a meaningful decree. PSR's claim is directly  
 11 related to BNSF's actions. BNSF is liable under MTCA because it "arranged for disposal" of  
 12 hazardous substances at the PSR site. RCW 70.105D.040(1)(c). PSR has dedicated all of its  
 13 corporate resources to clean up the environmental damage caused by wood treatment operations  
 14 during its tenure, and during the tenure of other operators of the plant. But PSR is only one of  
 15 many liable parties, and therefore PSR has paid more than its equitable share of costs incurred to  
 16 date.

17 PSR seeks two different types of relief. One is an award of monetary damages to  
 18 reimburse it for BNSF's equitable share of liability. The second is a declaratory judgment for  
 19 costs that may be required in the future. The Court can adequately address the monetary claim  
 20 by rendering judgment for monetary damages. The Court can similarly redress the future  
 21 liability by rendering judgment that BNSF is liable for a certain percentage of future costs.  
 22 These remedies are not speculative, nor do they depend on a tenuous connection between the  
 23 remedy and the harm. The Court's judgment itself will easily redress PSR's injury.

24 BNSF contends, without any authority, that PSR's injury will not be redressed since "a  
 25 favorable decision would not change PSR's liability to the United States (or the Native American  
 26 Tribes who are also parties to the Consent Decree) and would not void or eliminate PSR's

obligations under the Decree.” BNSF Motion at 19. If that were the legal test, many run-of-the-mill cases would fail to establish standing. Bankruptcy trustees and receivers or liquidators of all sorts would be unable to establish standing since they would frequently be unable to show that the bankrupt entity on whose behalf they prosecute claims will ever return to solvency. Chapter 7 bankruptcy trustees routinely bring actions on behalf of companies that by definition will not survive to personally enjoy the proceeds of the lawsuit. 7 U.S.C. § 323(b); *In re United Ins. Management, Inc.*, 14 F.3d 1380, 1386 (9<sup>th</sup> Cir. 1994) (a Chapter 7 trustee must “investigate and litigate potential lawsuits that might be brought on behalf of the debtor”). Like all actions taken by a Chapter 7 trustee, an action under § 323(b) is brought in order to liquidate and distribute the debtor company’s assets for the benefit of creditors, not the bankrupt. *In re Conlye*, 159 B.R. 323, 325 (Bankr.D. Idaho 1993). BNSF’s argument that PSR lacks standing does not withstand even a cursory analysis.

The two cases BNSF cites to support its redressability argument dealt with statutory issues - whether plaintiffs in environmental cases had alleged the types of harm that were addressed by the pertinent statutes - not whether their harms were beyond the scope of the Court’s power due to lack of standing. In the first case, *Doyle v. Town of Litchfield*, 372 F.Supp.2d 288 (D. Conn. 2005), the plaintiff sought, under the Resource Conservation and Recovery Act (RCRA), cleanup costs incurred in the past, as well as prospective business losses. The court held that plaintiff’s injuries could not be compensated under RCRA because “RCRA’s remedies do not provide for past cleanup costs or damages.” *Id.* at 303.

The court in *Wademan v. Concra*, 13 F.Supp. 295 (N.D.N.Y. 1998), also held that the remedies sought were beyond the scope of the environmental statutes being invoked. Plaintiffs claimed that exposure to benzene gave Ms. Wademan leukemia. They sued under CERCLA, the Clean Water Act, and RCRA, but the Court held that the personal injuries alleged were not compensable under these environmental statutes.



1           Though BNSF claims that PSR lacks Article III standing, PSR's claims meet the injury in  
 2 fact and redressability tests of the Constitution. BNSF's argument is really statutory, that PSR  
 3 has not suffered an injury contemplated by MTCA, and that any injury it has suffered is therefore  
 4 not redressable under MTCA. Because PSR has incurred remedial action costs under MTCA, as  
 5 discussed above, PSR has standing to bring its claims under MTCA.

### 6           **3. PSR Is Asserting Its Own Rights, Not EPA's.**

7           PSR is not asserting EPA's claims in this case. It is asserting its own, as a liquidating  
 8 entity. PSR brought this action in its own name to obtain contribution toward the remedial  
 9 action costs it has already paid and a declaration of BNSF's proportional liability for future costs.  
 10 PSR has legitimate MTCA claims against BNSF, and the fact that the money PSR receives will  
 11 be paid to EPA for environmental cleanup and to the Natural Resource Trustees to compensate  
 12 for injury to the region's important natural resources is irrelevant to PSR's right to recover.

13           The absurdity of BNSF's argument is demonstrated by the combination of its rejection of  
 14 PSR's right to recover with its denial that EPA has a claim against it. While over \$11 million  
 15 has been spent to clean up a contaminated site for which it is liable, BNSF argues that EPA has  
 16 no claim because it has already been reimbursed, and that PSR has no claim because it paid its  
 17 money to EPA pursuant to a Consent Decree rather than to remedial action contractors.  
 18 Miraculously, the claim against BNSF has disappeared into thin air. BNSF's argument has  
 19 neither logic nor legal authority behind it.

20           In addition, BNSF's arguments would frustrate the goals of both federal and state cleanup  
 21 laws. MTCA was enacted to protect our citizens' "fundamental and inalienable right to a  
 22 healthful environment." RCW 70.105D.010(1). As with CERCLA, its federal counterpart,  
 23 MTCA recognized that the costs of cleaning up befouled areas can be monumental.  
 24 RCW 70.105D.010(3). The statutory scheme therefore created joint and several liability  
 25 "because it is essential that sites be cleaned up well and expeditiously." RCW 70.105D.010(5).

26           The Consent Decree entered by Judge Rothstein in 1994 has the same goals:

[C]essation of wood treating operations at PSR's West Seattle wood treating facility; transfer of all shares, ownership rights and interests in PSR by Individual Settling Defendants to the Environmental Trust; the liquidation of all PSR assets; the payment of the proceeds from the liquidation to PSR creditors and, to the maximum extent possible under the circumstances, to the United States Hazardous Substance Superfund ("Fund") and the registry of this court, as set forth in the Liquidation Plan attached hereto; the orderly transfer of responsibility for the implementation of environmental response actions at the Sites from PSR to EPA contractors or designees; and issuance of covenants not to sue by Plaintiffs to Individual Settling Defendants as set forth in Section XI of this Consent Decree.

Reavis Dec. at 71.

The Consent Decree was intended to "expedite the cleanup of the Sites" and acknowledged that cleanup was "necessary to protect the public health, welfare, and the environment." *Id.* at 71, 82. Although certain individual defendants received a covenant not to sue for entering into the 1994 Consent Decree, PSR did not, and is therefore still liable. *Id.* at 93-96. The Consent Decree recognized that PSR would continue to exist as a lawful corporation, although it contemplated an ultimate dissolution. *Id.* At 83. It required that "[a]ll assets and resources of PSR shall be liquidated and the proceeds therefrom shall be disbursed by the Environmental Trust pursuant to the Liquidation Plan." *Id.* at 84. PSR and the PSR Environmental Trust were instructed to use "best efforts" to "[m]aximize the amount of funds paid into the Fund and the registry of this court, consistent with this Consent Decree." *Id.* at 85. The Consent Decree recognizes that PSR would pursue contribution claims that it had against any other Potentially Responsible Parties. *Id.* at 96. It also specifically approved the terms of the PSR Environmental Trust and the Liquidation Plan that were attached. *Id.* at 111; 115

If BNSF's standing theory were the law, in 1994 PSR would have had little incentive to enter into the Consent Decree. Instead, absent contribution rights, it would have been compelled to continue to fight EPA until such time as EPA filed a lawsuit against all responsible parties – including BNSF. Alternatively, PSR could have declared bankruptcy, and given its assets over to a bankruptcy trustee, who would have pursued the same claims PSR is now pursuing against

1 BNSF. As these two scenarios illustrate, the arguments BNSF now advances are a misguided  
2 (and unsupported) attempt to exalt form over substance.

3 It is highly doubtful that Judge Rothstein intended to have the cleanup of the sites foiled  
4 by clever arguments that, through sleight of hand, make the claims completely disappear. This  
5 Court retained continuing jurisdiction over both the subject matter of the Consent Decree and the  
6 defendants “for the purpose of enabling any of the Parties to apply to the Court at any time for  
7 such further order, direction, and relief as may be necessary or appropriate for the construction or  
8 modification of this Consent Decree, or to effectuate or enforce compliance with this Consent  
9 Decree, or to resolve disputes in accordance with this Consent Decree.” *Id.* at 101. This Court  
10 also empowered PSR to advance the same claims that are now being brought against BNSF. It  
11 cannot credibly be said that PSR now lacks standing to bring the claims.

#### 12 **D. PSR’s Tort Claims Should Not Be Dismissed**

##### 13 **1. PSR’s Has Standing to Bring Its Tort Claims.**

14 Under Washington law, a nuisance is “whatever is injurious to health or indecent or  
15 offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere  
16 with the comfortable enjoyment of the life and property.” RCW 7.48.010. While this definition  
17 specifically requires a plaintiff to prove interference with his “free use” and “comfortable  
18 enjoyment” of “the life and property,” it does not require that he own or hold any possessory  
19 interest in the affected property. Courts evaluating claims for nuisance have recognized this  
20 distinction, focusing on the elements of use and enjoyment rather than possession and ownership.  
21 *See, e.g., Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 592, 964 P.2d 1173 (1998)  
22 (nuisance is “an unreasonable interference with another’s use and enjoyment of property”) and  
23 *Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998) (“[a]n actionable nuisance must either  
24 injure the property or unreasonably interfere with enjoyment of the property”).<sup>3</sup>

25  
26 <sup>3</sup> Other provisions of RCW Ch. 7.48 further confirm that the legislature contemplated that interference with “use,” not necessarily ownership, be a critical element of a nuisance claim. *See, e.g.,* RCW 7.48.120, which provides,

1 That a nuisance action under Washington law does not require ownership is perhaps most  
 2 evident from a review of the principles of public nuisance and the case law construing those  
 3 principles.<sup>4</sup> RCW 7.48.130 defines a public nuisance as “one which affects equally the rights of  
 4 an entire community or neighborhood, although the extent of the damage may be unequal.”  
 5 RCW 7.48.140 enumerates nine conditions that constitute public nuisance, many of which arise  
 6 from impacts on property that cannot be privately owned. These include impacts on any  
 7 “watercourse,” “stream,” “common sewer, street, or public highway” (Subsection 2); “river,  
 8 harbor, or collection of water” (Subsection 3); or “public highway,” “street,” “alley,” or  
 9 “commons.” Impacts on such property that are found to offend or to interfere unreasonably with  
 10 use and enjoyment of property have been held to support a claim for public nuisance. *See, e.g.,*  
 11 *Tiegs*, 135 Wn.2d at 15 (in dispute between private parties, upholding jury instruction that any  
 12 discharge of pollutants into state waters constitutes an actionable nuisance); *Miotke v. Spokane*,  
 13 101 Wn.2d 307, 331, 678 P.2d 803 (1984) (holding that owners of waterfront property stated  
 14 cognizable claim for nuisance against City for discharging sewage unto river); and *Bales v.*  
 15 *Tacoma*, 172 Wash. 494, 503, 20 P.2d 860 (1933) (upholding judgment in favor of private party  
 16 against municipality for nuisance created by the dumping of trash and sewage into public  
 17 waterway).

## 18 **2. PSR’s Tort Claims Are Not Barred by the Statute of Limitations.**

19 In addition to their MTCA claims, the Port and PSR also stated causes of action for  
 20 negligence, nuisance and trespass arising out of the contamination. BNSF contends that these  
 21 claims are time-barred because Plaintiffs did not file them within three years of the date that the  
 22 “cause of action accrues – in other words, when the party first gains the right to apply to the  
 23

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24 “Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys,  
 25 injures or endangers the comfort, repose, health or safety of others, offends decency . . . or in any way renders other  
 persons insecure in life, or in the *use of property*.” (Emphasis added.)

26 <sup>4</sup> PSR has asserted causes of action for both private and public nuisance. Complaint, ¶ 4.17

1 court for relief.” BNSF Motion at 23. While BNSF has stated the general rule correctly, that  
 2 rule does not apply to this case, where the acts complained of constitute continuing torts. In such  
 3 cases, the statute of limitations is extended as long as the tort continues. Here, the tort will  
 4 continue until the contamination is abated.

5 Washington courts recognize the “continuing” theory of torts. *Fradkin v. Northshore*  
 6 *Utility Dist.*, 96 Wn. App. 118, 977 P.2d 1265 (1999) (continuing trespass); *Riblet v. Portland*  
 7 *Cement Co.*, 41 Wn. 2d 249, 248 P.2d 380 (1952) (continuing nuisance). A continuing tort is  
 8 identifiable by the temporary and ongoing nature of the injury. *Fradkin*, 96 Wn. App. at 125-26.  
 9 Further, the harm caused by a continuing tort must be reasonably abatable. *Id.* This is  
 10 distinguished from permanent harm, which, as the name implies, includes injuries that may not  
 11 be remedied even if the acts causing the impairment cease. *Hardin v. Olympic Portland Cement*  
 12 *Co.*, 89 Wash. 320, 329, 154 P. 450 (1916).

13 Permanent tort claims must generally be brought within three years, as BNSF claims.  
 14 The expiration of the three years, however, will not bar a continuing tort claim. *E.g., Fradkin*, 96  
 15 Wn. App. at 124-25. Rather, continuing tort claims survive until the harm is abated. *Bradley v.*  
 16 *American Smelting and Refining Co.*, 104 Wn.2d 677, 693, 709 P.2d 782 (1985) (smelter’s  
 17 contamination of property was a continuing trespass: “[a]ssuming that a defendant has caused  
 18 actual and substantial damage to a plaintiff’s property, the trespass continues until the intruding  
 19 substance is removed”). In fact, a plaintiff may bring successive tort claims every few years to  
 20 address the harm from continuing nuisance and negligent actions. *Overby v. Campbell Motel*  
 21 *Properties*, 1997 WL 288970, \*2 (Wash. Ct. App. 1997) (“One suffering from an injury in the  
 22 nature of a continuing nuisance may recover damages as often as he brings action thereof”),  
 23 quoting *Island Lime Co. v. Seattle*, 122 Wash. 632, 635 (1922); 51 Am. Jur. 2d, *Limitations of*  
 24 *Actions* §124. In such instances, plaintiff is allowed to claim those damages that accrued within  
 25 three years before the date the lawsuit was filed and the date of trial.  
 26

1 The issue of whether a tort is continuing or permanent ordinarily is one of fact. *Fradkin*,  
2 96 Wn. App. at 126. Here, however, it is undisputed that significant contamination remains on  
3 the Site and that efforts are still underway to abate the contamination. Since the torts alleged in  
4 Plaintiff's complaint are continuing, this action was timely.

5 **IV. CONCLUSION**

6 For the reasons stated above, BNSF's motion should be denied.

7 DATED this 17<sup>th</sup> day of October, 2005.

8 /s/ Gillis E. Reavis

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